RECENT DECISIONS.

AGENCY—ESTOPPEL—FRAUDULENT OVERISSUE OF CERTIFICATES BY OFFICER OF CORPORATION.—The defendant bought land for cemetery purposes from various owners who pooled their debts against the defendant, taking as evidences thereof "shares" identical with stock-certificates in form and method of issue. They were issued by the Comptroller with whom blank certificates were left, and who filled out some of these blanks in his own name and pledged them to a holder in good faith. *Held*, the pledgee could recover against the company. *Amer. Exch. Nat. Bank* v. *Woodlawn Cemetery* (1907) 105 N. Y. Supp. 305.

Where an agent's authority to do a particular act, is by the terms of that authority made dependent on extrinsic facts peculiarly within the agent's knowledge, the authority to make the representation that these facts exist must be deemed to have been given. *N. Y. N. H. & H. R. R. Co.* v. *Schuyler* (1865) 34 N. Y. 30. Thus, a corporation is estopped to deny the authority of its officers in issuing certificates of stock, *Cincinnati etc. R. Co.* v. *Cit. Nat. Bank* (1897) 56 Oh. St. 35, even though they constitute an overissue, and the corporation is consequently liable in damages. *Kisterbock's Appeal* (1889) 127 Pa. St. 601. But these results are not limited to certificates of stock. *Bank of Batavia* v. *R. Co.* (1887) 106 N. Y. 195; *Hanover Bank* v. *Amer. Dock & Trust Co.* (1896) 148 N. Y. 612. In the principal case the "shares" were by their form and nature an affirmation of ownership in the person named therein, cf. *Holbrook* v. *N. Y. Zinc Co.* (1874) 57 N. Y. 616, of a portion of the defendant's obligation; and the correctness of this affirmation lay as peculiarly within the knowledge of the issuing officer, as in the case of certificates of stock.

AGENCY—INITIATION TO LODGE—NEGLIGENCE OF OFFICER.—The incorporated Supreme Tent formulated rules for the local lodges under its jurisdiction, and prescribed the ritual which the local officers were bound to follow. In the performance of the ritual the plaintiff was injured. *Semble*, even if the contract provided that the officers performing the ritual were to be the plaintiff's agents, he could recover. *Thompson* v. *Supreme Tent etc. of Maccabees* (1907) 38 N. Y. Law Jour. No. 18.

Local lodge officers when performing the ritual prescribed by the Supreme Lodge are the latter's agents. *Mitchell* v. *Leech* (1904) 69 S. C. 413. Agency depends on correlative rights and duties, *Knights of Pythias* v. *Withers* (1900) 177 U. S. 260; *Sternaman* v. *Met. Ins. Co.* (1902) 170 N. Y. 13; 2 COLUMBIA LAW REVIEW 334, and, while these remain, no contract by the principal with the third person can make the latter the principal. *Matter of Brown* v. *Order of Foresters* (1903) 176 N. Y. 132. But the contract may be construed as an assumption of risk by the candidate of the officers' negligence. An assumption of risk has been declared invalid, because against public policy, of the negligence of a trusted agent, as a physician; *Sternaman* v. *Met. Ins. Co., supra;* of the negligence of the officer of a local lodge; *Matter of Brown* v. *Order of Foresters, supra;* and of an employer's negligence. *Johnson* v. *Fargo* (1906) 184 N. Y. 379. The principal case bears a close analogy to this group of cases. The candidate has no control over the officers or ritual; the Supreme Lodge is over both, and should provide a safe ritual. The parties are not on an equal footing, and the tendency of the principal case is sound. Cf. *Kaminiski* v. *Knights of Modern Maccabees* (1906) 146 Mich. 16; *Jumper* v. *Sov. Camp of Woodmen* (1904) 127 Fed. 635.

CONSTITUTIONAL LAW—EXTRADITION UNDER TREATY—TRIAL FOR CRIME COMMITTED SUBSEQUENT TO EXTRADITION.—A defendant, extradited from Canada under the extradition treaty, committed perjury during his trial. He was

held for trial on this charge. *Held*, that one in custody under extradition proceedings could be held for trial for a crime committed subsequent to the extradition. *Ex parte Collins* (Cal. 1907) 90 Pac. 827.

The rule has been established that one brought into the jurisdiction by proceedings under an extradition treaty may not, until a reasonable time has been given him to return to the country from which he has been taken, be tried for other than an extraditable offence, *U. S.* v. *Watts* (1882) 14 Fed. 130, or any other than the particular offence for which extradition was granted. *U. S.* v. *Rauscher* (1886) 119 U. S. 407; *Comm.* v. *Hawes* (Ky. 1878) 13 Bush 697; *State* v. *Vanderpool* (1883) 39 Ohio St. 273. Extradition treaties are held to contain an implied clause to this effect, because of the enumeration therein of certain crimes, which is held to exclude all others; the requirement that evidence of the crime charged shall be presented to the government granting extradition; and the recognized policy of nations of granting an asylum in certain cases. See cases cited *supra*. But in the cases establishing this rule the crime under consideration was committed prior to the extradition. The limitation of the doctrine to such cases is sound, as the reasons presented for the rule are inapplicable in the case of crimes committed subsequent thereto. The domestic government must maintain its sovereignty, and a contrary rule would permit one extradited to commit with impunity any offence not covered by the treaty.

CONSTITUTIONAL LAW—INTERSTATE COMMON LAW—NUISANCE.—The state of Georgia brought an action to enjoin the defendant company from discharging noxious gas from its works in Tennessee over the plaintiff's territory. The bill alleged great damage to the agricultural interests of the state, but practically no direct injury to distinctively state property. *Held*, the injunction should issue. *Georgia* v. *Tennessee Copper Co.* (1907) 206 U. S. 230.

In 1851, in a suit to which Pennsylvania was a party, desiring to abate as a nuisance a bridge across the Ohio River, *Pennsylvania* v. *Bridge Co.*, 13 How. U. S. 519, all of the judges held that a state has no more right to such an injunction than a private individual, see pp. 560, 579, and that to authorize the court to take jurisdiction there must have been a breach by the defendant of a United States statute, since there was no common law binding on the United States courts. See pp. 565, 580. In *Missouri* v. *Illinois* (1906) 200 U. S. 496, the court departed radically from the above position, and declared that the analogy to an action between individuals was misleading, and laid down the rule that, on the one hand, the court would not entertain actions by states merely because similar actions could be maintained by individuals, but that, on the other, controversies between states, which, if they arose between independent states, might lead to war, are justiciable by the Supreme Court without express statutory authorization. The principal case goes a step further in defining the legal rights peculiar to the component states of the Union. It is held that the gravamen of the action is not irreparable injury to property, but an infraction of the "quasi-sovereign" rights of the state, and that an injunction may, therefore, be granted to a state, when in a similar case between individuals, the balance of convenience would point the other way. This is a new phase of a unique and interesting system of American common law. See 7 COLUMBIA LAW REVIEW 539.

CONSTITUTIONAL LAW—POLICE POWER—RIGHT TO CONTRACT.—A statute made it a misdemeanor to pay employees for labor performed in tickets redeemable in merchandise. *Held*, the statute was unconstitutional, as interfering with the right to contract. *Jordan* v. *State* (Tex. 1907) 103 S. W. 633.

The right to make contracts is protected by the Fourteenth Amendment; *Allgeyer* v. *Louisiana* (1897) 165 U. S. 578; but this is not construed to limit the state in the exercise of the police power. *Bartier* v. *Connoly* (1884) 113 U. S. 27. The extent of the police power over contracts of employment is necessarily very confined, applying only where the health

of the employee is involved; thus, while a statute limiting the working hours of miners was held constitutional, *Holden* v. *Hardy* (1898) 169 U. S. 366, a similar statute as to bakers was held unconstitutional. *Lochner* v. *New York* (1905) 198 U. S. 45; 5 COLUMBIA LAW REVIEW 462. If statutes derogatory of the rights of the individual look merely to the general welfare of laborers, they are almost invariably classed as without the limits of the police power. *Kellyville Coal Co.* v. *Harrier* (1904) 207 Ill. 624; *Commonwealth* v. *Perry* (1891) 155 Mass. 117; *Godcharles* v. *Wigeman* (1886) 113 Pa. St. 431; *State* v. *Loomis* (1893) 115 Mo. 307; contra, *Hancock* v. *Gorden* (1889) 121 Ind. 366; *Knoxville Iron Co.* v. *Harbison* (1901) 183 U. S. 13, on the ground that they are police regulations. The reasoning in the cases last cited seems to have been ignored by later federal cases. *Lochner* v. *New York, supra.* The principal case is one more authority imposed in the path of class legislation.

CONSTITUTIONAL LAW—POWERS OF TERRITORIAL CONSTITUTIONAL CONVENTION.—The constitutional convention of the Territory of Oklahoma called under a congressional enabling act, inserted in the draft of the proposed constitution a provision for the division of Woods County into three counties; and by an ordinance provided for the appointment of new election officials for two of the counties. *Held,* the ordinance was valid, as a convention was a sovereign body endowed with legislative powers. *Frantz* v. *Autry* (Okl. 1907) 91 Pac. 193. See NOTES, p. 611.

CONSTITUTIONAL LAW—QUASI-JUDICIAL FUNCTIONS—NEW YORK RECOUNT ACT.—A statute provided that on the petition of a candidate for election, the Supreme Court should appoint commissioners to count the ballots, attorneys representing the candidates being present. That any ballot then disputed should be passed upon by a Supreme Court justice, with a final review by the Appellate Division; and that the result of this count should determine to whom the Supervisor of Elections should issue an election certificate. *Held,* by the Appellate Division, First Department, that the statute was unconstitutional. *Matter of Metz* v. *Dayton* (1907) 105 App. Div. 809

Contra, by the Appellate Division, Second Department. *Matter of Metz* v. *Maddox* (1907) 105 App. Div. 702. See NOTES, p. 603.

CONSTITUTIONAL LAW—SUITS AGAINST A STATE.—A suit by the state attorneys of Arkansas was instituted against a foreign corporation to enforce a license tax by penalties as provided by an alleged unconstitutional statute. The corporation sought an injunction in a federal court to restrain such action. *Held,* the federal court had no jurisdiction, as the injunction sought was one against the state. *Western Union etc. Co.* v. *Andrews* (1907) 154 Fed. 95. See NOTES, p. 609.

CONTRACTS—COLLATERAL AGREEMENTS—LEASES TO MONOPOLIES.—In furtherance of a scheme to create a monopoly, B leased a distillery from A, who knew the motive of the lessee, but did not become a party to the combination. *Held,* Scott, J. dissenting, under N. Y. Laws 1897, p. 310, c. 383, prohibiting a combination whereby a monopoly in the production or sale of any common article is or may be created, such lease was not invalid. *Brooklyn Distilling Co.* v. *Standard Distil. & D. Co.* (1907) 105 N. Y. Supp. 264.

Where illegality is involved in one of the engagements or conditions of, or forms the inducement or object of entering into, the contract, such contract is invalid. 7 COLUMBIA LAW REVIEW 418. But mere knowledge of intended illegal use will not invalidate, save where such use would involve a serious crime or moral turpitude. *Hodgson* v. *Temple* (1813) 5 Taunt. 181; *Tracy* v. *Talmage* (1856) 14 N. Y. 162. This broad distinction between illegal contracts and contracts only collateral to an illegal purpose is aptly illustrated in cases arising under statutes invalidating all contracts tending to the formation of monopolies; *U. S. Chemical Co.* v. *Prov. Chem. Co.*

(1894) 64 Fed. 946; *Connolly* v. *Union Sewer Pipe Co.* (1902) 184 U. S. 540; *Cummings* v. *Blue Stone Co.* (1900) 164 N. Y. 401; *Field Cordage Co.* v. *National Cord. Co.* (1892) 6 Ohio Cir. Ct. 615; nor does the motive in leasing affect the legality of such merely collateral contracts. *U. S. Chem. Co.* v. *Prov. Chem. Co., supra,* 950; *Metcalf* v. *American School Furn. Co.* (1903) 122 Fed. 115; *Diamond Match Co.* v. *Roeber* (1887) 106 N. Y. 473, 482. A very recent Federal decision reaches a result similar to that in the principal case. *Camors Co.* v. *McConnell* (1905) 140 Fed. 412; cf. *Swift & Co.* v. *U. S.* (1904) 196 U. S. 375.

CONTRACTS—RESTRAINT OF TRADE—TELEPHONE—EXCLUSIVE PRIVILEGE.—A public telephone company installed an exchange system throughout a hotel, under a contract of exclusive privilege. It was sought to enjoin the proprietor from installing also the system of a rival company. *Held,* injunction denied; the contract of exclusive privilege was void as in "restraint of trade." *Cent. N. Y. Telep. & Teleg. Co.* v. *Averill* (Sup. Ct. 1907) 105 N. Y. Supp. 378.

That the defendant was an innkeeper was not considered, and that circumstance in itself would seem immaterial. Cf. *West. Union Tel. Co.* v. *Rogers* (1886) 42 N. J. Eq. 311. On the assumption that the enforcement of this particular contract will justify a system of restrictive agreements, the *ratio decidendi* is frankly the Court's personal disfavor of telephone monopolies; but authority is sought in the recent application of the doctrine of "restraint of trade" to a loose group of contracts tested, not by their reasonableness with respect to the promisor, *Nordenfelt* v. *Maxim Nordenfelt Co.* [1894] A. C. 535, but by the fact that, however slight the restraint, there is public injury. *Trans. Co.* v. *Pipe Line Co.* (1883) 22 W. Va. 600, 625; see 7 COLUMBIA LAW REVIEW 50. The cases under this head, however, seem to involve some direct combination between competing public service corporations, *Gibbs* v. *Baltimore Gas Co.* (1888) 130 U. S. 396; *Chicago Gas Light Co.* v. *People's Gas Light Co.* (1887) 121 Ill. 268, and the abandonment of charter duties, *People* v. *Chicago Gas Trust Co.* (1889) 130 Ill. 268, or some conflict with the state's right of eminent domain, *West. Union Tel. Co.* v. *Amer. Union Tel. Co.* (1880) 65 Ga. 160, or even the infraction of a prohibitive statute. *Gibbs* v. *Baltimore Gas Co., supra.* Possibly the result might be sustained on the ground that as public policy had expressed itself in the granting of two franchises, equity must not limit the public value of the second company or further a competition which might become ruinous. But on the express ground of "restraint of trade," especially in view of the apparent reluctance of the New York Court of Appeals to extend the doctrine, *Matthews* v. *Associated Press* (1893) 136 N. Y. 333; *Diamond Match Co.* v. *Roeber* (1887) 106 N. Y. 473; *Oakes* v. *C. W. Co.* (1894) 143 N. Y. 430, even where a common carrier is involved, *Leslie* v. *Lorillard* (1888) 110 N. Y. 519; *Lough* v. *Outerbridge* (1894) 143 N. Y. 271, the decision seems at least of doubtful validity. Cf. *The Telephone Case,* 3 Can. Ry. Cas. 203; s. c. 17 Green Bag 375. But see *Gwynn* v. *Cit. Tel. Co.* (1904) 69 S. C. 434, which accords with the principal case. Cf. *State ex rel. Gwynn* v. *Cit. Tel. Co.* (1901) 61 S. C. 83.

CORPORATIONS—RESERVED POWER TO AMEND CHARTER.—The legislature passed a general act authorizing a two-thirds majority of the stockholders of a corporation to impose assessments upon the full-paid capital stock, which the articles of incorporation had provided should be non-assessable. *Held,* the act was unconstitutional. *Garey* v. *St. Joe Mining Co.* (Utah 1907) 91 Pac. 369. See NOTES, p. 598.

CRIMINAL LAW—CONSPIRACY—INTENT.—At a meeting of a theatrical managers' association a statement was read by the defendant, one of their number, which advocated taking "necessary steps to prevent" their "business interests being injured" by a certain dramatic critic, who had persistently attacked the association on racial grounds; in consequence of which state-

ment the critic was forcibly excluded from several theatres controlled by members of the association. *Held*, this did not constitute a conspiracy under Pen. Code § 168, subd. 5, making it a misdemeanor to conspire "To prevent another from exercising a lawful trade or calling, by force, threats or intimidation." *People ex rel. Burnham* v. *Flynn* (N. Y. Ct. of App. 1907) 38 N. Y. Law Jour., No. 7.

This decision is open to serious objections. The means used by the managers were lawful; *Collister* v. *Hayman* (1905) 183 N. Y. 250; they had every provocation to retaliate, and their motive was legitimate. But clearly their intention was to exclude the critic; and the inevitable consequence being to prevent him from exercising his calling, their intention was criminal under the statute. *Reg.* v. *Sharpe* (1857) 7 Cox C. C. 214; *People* v. *Kirby* (N. Y. 1823) 2 Park. Cr. R. 28; Clark & Marsh., Crim. Law §§ 58, 64, 65. This conclusion is strengthened by the labor decisions under the statute in question, in which defendants whose motives were lawful, *Nat. Prot. Assn.* v. *Cummings* (1902) 170 N. Y. 315, have been convicted. *People* v. *Kostka* (1886) 4 N. Y. Cr. 429; *People ex rel. Gill* v. *Smith* (1887) 10 N. Y. St. 730; *People ex rel. Gill* v. *Walsh* (1888) 15 N. Y. St. 17; and see *In re Emmanuel* (N. Y. 1821) 6 City Hall Rec. 33. If the court has not confused motive and intent, it has virtually inserted the word "wantonly" into the statute, a construction devitalizing and, under previous decisions, inadmissible. *People* v. *Kostka, supra.*

CRIMINAL LAW—CRIMES PUNISHABLE IN DIFFERENT JURISDICTIONS.—The defendant was indicted for a violation of the Elkins Act prohibiting the receipt of any rebate or concession in respect of the transportation of property "whereby any such property shall by any device be transported," and providing for prosecution "in any court of the United States having jurisdiction of crimes within which such violation was committed or through which the transportation may have been conducted." The rebate was received in Kansas, and the indictment found in Missouri. *Held*, the jurisdiction clause of the statute was constitutional, as the offense was a continuing crime. *Armour Packing Co.* v. *United States* (1907) 153 Fed. 1. See NOTES, p. 605.

CRIMINAL LAW—HOMICIDE—APPEAL AND ERROR—REDUCTION OF DEGREE IN MURDER VERDICT.—The temporary admission of testimony against a defendant, convicted of murder in the first degree, was declared prejudicial error. Its proper influence on the jury, however, was conceived by the reviewing Court as limited to the proof of premeditation, as the other elements of murder seemed clearly established. *Held*, the judgment of murder in the first degree should be reversed, but the appellant should be sentenced for murder in the second degree. *Washington* v. *State* (Ark. 1907) 103 S. W. 617.

In two earlier cases, where the whole record on appeal, without any wrong exclusion or admission of evidence, did not show premeditation, the same Court made a like order, *Simpson* v. *State* (1892) 56 Ark. 8; *Eastling* v. *State* (1901) 69 Ark. 189, on the theory that a verdict of conviction for murder in the first degree includes a verdict of conviction for the less offense; and similarly, in the absence of proof of force, it reduced robbery to larceny. *Routt* v. *State* (1896) 61 Ark. 594. This discretion, denied to a trial judge, *State* v. *Symes* (1897) 17 Wash. 596; cf. 2 Ballinger, Stat. Wash. § 6955 and Kirby, Stat. Ark. § 2409, seems to be assumed by the Arkansas Supreme Court as part of its statutory power to modify judgments, *Routt* v. *State, supra; Kirby, supra*, § 1236, but such construction is questionable, *Simpson* v. *State, supra*, 20; and similar action under a like statute, *State* v. *Freidrich* (1892) 4 Wash. 204, has been declared by a Federal Court a violation of the Fourteenth Amendment. *In re Freidrich* (1892) 51 Fed. 747. Moreover, while a verdict must be sustained if there is any evidence which, if believed, justifies it, the appellate court in overthrowing a verdict cannot presume that any particular evidence was believed or considered

by the jury; and to infer a conviction for all less degrees on the ground that each element of the major crime must have been separately ascertained, is to turn the jury's general verdict into a series of special verdicts. That the Supreme Court is really substituting its own findings of fact appears more glaringly in the later cases where it gauges the weight which excluded evidence ought to have had, *Vance* v. *State* (1902) 70 Ark. 272, or, as in the principal case, the influence of evidence improperly in the minds of the jury. *Levy* v. *State* (1902) 70 Ark. 610; *Darden* v. *State* (1904) 73 Ark. 315. Though the same practice has been followed elsewhere, apparently under no better authority, *McCormick* v. *State* (1868) 27 Iowa 402, 414, Rev. Stat. Iowa, 1860, § 495; *People* v. *O'Callaghan* (1886) 2 Ida. 156; *State* v. *Freidrich, supra,* and when cautiously exercised, may avoid certain notorious evils of criminal procedure, it is "judicial legislation," unsound in principle. Cf. *In re Freidrich, supra.*

DAMAGES—DESTRUCTION OF CROP—SUBSEQUENT EVENT.—The obstruction of a creek by the defendant caused a flooding of the plaintiff's land and the destruction of his crop. Before the crop would have reached maturity there occurred an extraordinary rainfall which would have caused the land to be flooded and the crop to be destroyed regardless of the obstruction. *Held,* that evidence of the subsequent rainfall should be admitted to show that no actual damage was suffered. *International & G. N. R. R. Co.* v. *Jackson* (Tex. 1907) 103 S. W. 709.

The measure of damages generally adopted in a case of destruction of crops is the difference between the value of the crops when they would have reached maturity, and the expense necessary to cultivate them. *Smith* v. *R. R. Co.* (1874) 38 Ia. 518; *Sommeland* v. *Ry. Co.* (1886) 35 Minn. 412. This, however, is dependent on whether the crop would ever in fact have arrived at maturity, *Ry. Co.* v. *Yarborough* (1892) 56 Ark. 612; *People's Ice Co.* v. *Steamer Excelsior* (1880) 44 Mich. 229, and as evidence of facts subsequent to the destruction may be introduced to determine what the value would be when matured, so also should such evidence be allowed to show that maturity would never be reached. *Ry. Co.* v. *Yarborough, supra.* This does not make the damage depend on events subsequently happening, but is merely evidence determining the damage actually suffered at the time of destruction. *Sommeland* v. *Ry. Co., supra; Parsons* v. *Pettingill* (Mass. 1866) 11 Allen 507.

DOMESTIC RELATIONS—DIVORCE—CRUELTY—FALSE CHARGES OF ADULTERY.—A wife publicly made repeated false charges of adultery against her husband. *Held,* two judges dissenting, under a statute granting a divorce for "cruelty and inhumane treatment" this entitled the husband to a decree. *Massey* v. *Massey* (Ind. 1907) 81 N. E. 732.

Following the English ecclesiastical law, *Evans* v. *Evans* (1790) 4 Eng. Eccl. 310, cruelty constitutes a ground for divorce in most American jurisdictions. Stimson, Amer. Stat. Law, § 6201, (4). Malicious conduct inducing mental suffering and seriously endangering the health generally suffices; *Atherton* v. *Atherton* (N. Y. 1894) 82 Hun 179; *Reinhard* v. *Reinhard* (1897) 96 Wis. 555; *Walmesley* v. *Walmesley* (1893) 69 L. T. Rep. N. S. 152; though formerly some element of physical violence was requisite. *Walton* v. *Walton* (1860) 32 Barb. 203; *Johnson* v. *Johnson* (1855) 4 Wis. 135; *Hudson* v. *Hudson* (1863) 3 Swab. & Tr. 314; cf. *Tomkins* v. *Tomkins* (1858) 1 Swab. & Tr. 168. Accordingly, by weight of authority, false charges of adultery preferred by the husband against the wife, if made in bad faith and without reasonable ground for believing them to be true, constitute legal cruelty. *Graft* v. *Graft* (1881) 76 Ind. 136; *Bahn* v. *Bahn* (1884) 62 Tex. 518; *Straus* v. *Straus* (N. Y. 1893) 67 Hun 491. Likewise, as to similar charges made by the wife against the husband. 1 Bishop, Marriage & Divorce, § 1636; *Whitmore* v. *Whitmore* (1882) 49 Mich. 417; *Sylvis* v. *Sylvis* (1888) 11 Colo. 319; *Smith* v. *Smith* (1879) 8 Ore. 100. Evidently assuming that the mental suffering caused by such statements

is not likely to affect a man as it would a woman, some jurisdictions hold, however, that the husband should only be given a decree where circumstances show that more than ordinary and usual mental anguish ensued. *McAllister* v. *McAllister* (1886) 71 Tex. 695; *Kelly* v. *Kelly* (1883) 18 Nev. 49; *Holyoke* v. *Holyoke* (1886) 78 Me. 404.

EMINENT DOMAIN—PUBLIC USE—RAILROAD.—A railroad sought to condemn land for its main line, which ran through a sparsely settled region to a lumber camp and coal mine, the owners of which controlled the railroad, and the existence of which was the chief inducement for its construction. *Held*, a public use. *Caretta Ry. Co.* v. *Coal Co.* (W. Va. 1907) 57 S. E. 401.

Despite the confusion which prevails as to what elements are in general required to constitute a public use, 4 COLUMBIA LAW REVIEW 133, there is no doubt as to the public nature of railroads. In the absence, however, of constitutional provisions permitting condemnation for lateral roads, *Ex parte Bacot* (1891) 36 S. C. 125, the road must be in fact a public railroad; *Bridal Veil Co.* v. *Johnson* (1896) 30 Ore. 205; *Garbutt Lumber Co.* v. *Ry.* (1900) 111 Ga. 714; *Sholl* v. *German Coal Co.* (1887) 118 Ill. 427; and the usual test of this is whether the public has the right to its use, *Phillips* v. *Watson* (1884) 63 Ia. 28; *Kettle River R. Co.* v. *Eastern R. Co.* (1889) 41 Minn. 461; *Ulmer* v. *R. Co.* (1904) 98 Me. 579; *Matter of Split Rock Co.* (1891) 128 N. Y. 408, irrespective of the number who have occasion to exercise that right. *DeCamp* v. *Underground R. Co.* (1885) 47 N. J. L. 43. A similar criterion has been applied to condemnation for analogous public uses. *Matter of Eureka Basin Co.* (1884) 96 N. Y. 42; *Fallsburg* v. *Alexander* (1903) 101 Va. 98; *Matter of Deansville Cemetery Ass'n.* (1876) 66 N. Y. 569; *Fort St. Union Depot Co.* v. *Morton* (1890) 83 Mich. 265; *Gaylor* v. *Sanitary District* (1903) 204 Ill. 576. It would seem also that to prevent abuses the use should be such that the public might have occasion to enjoy it. *State* v. *Ry. Co.* (1884) 40 Ohio St. 504; 4 COLUMBIA LAW REVIEW 133. Both these elements are present in the principal case. Should the railroad later prove a fraud upon the public, and fail to provide carrying facilities, it would be subject to damage suits, *Dietrich* v. *Murdock* (1868) 42 Mo. 279, 284, mandamus, *K. & T. Ry.* v. *Mining Co.* (1901) 161 Mo. 288, 308, and ouster from its franchises, *People* v. *R. Co.* (1879) 53 Cal. 694; *State* v. *Ry. Co.*, *supra*, and then the original owner could have his land freed from the easement. *Ry. Co.* v. *Petty* (1893) 57 Ark. 389. The principal case is supported by most of the authorities, *Chicago R. Co.* v. *Morehouse* (1901) 112 Wis. 1; *Ulmer* v. *R. Co.*, *supra*; *K. & T. Ry.* v. *Mining Co.*, *supra*; 1 Lewis, Em. Dom. (2nd Ed.) § 171, and is in accordance with the present conspicuous tendency of the courts to favor private mining development. *B. A. & P. Ry. Co.* v. *M. U. Ry.* (1895) 16 Mont. 504; 5 COLUMBIA LAW REVIEW 162; 6 id. 46.

EQUITY—EQUITABLE EASEMENTS—STATUTE OF FRAUDS.—The defendant sold part of a tract of land to the plaintiff, promising orally that he would erect only private residences on the lots retained. There was no basis for relief on the ground of fraud or estoppel. *Held*, since such building restrictions are easements, the parol promise could not be enforced in equity. *Norton* v. *Kain* (1907) 38 N. Y. Law Jour. No. 16.

The reasoning of the principal case seems unsound in confounding a building restriction with an easement. Courts of common law early refused to recognize any restrictions upon the use of lands, apart from the well-defined common law easements. Goddard, Easements, 5th ed., 28. At first, a similar tendency was noted in equity; *Keppel* v. *Bailey* (1834) 2 Myl. & K. 517, 535; but with *Tulk* v. *Moxhay* (1848) 2 Phil. 774, the law became well fixed that such restrictions would be binding as between the original parties and assignees with notice. 7 COLUMBIA LAW REVIEW 431. Whether regarded from the standpoint of equitable obligations, *Whitney* v. *Union Ry. Co.* (Mass. 1858) 11 Gray 359, 364; *Hayward etc. Assn.* v. *Miller* (N. Y. 1893) 6 Misc. 254, 256, or called quasi-easements, *Hubbell* v. *Warren*

(Mass. 1864) 8 Allen 173, 178, or negative easements, *Uihlein* v. *Matthews* (1902) 172 N. Y. 154, 158, or equitable easements, 5 Harv. Law Rev. 275; *Equitable Life Ass. Co.* v. *Brennan* (1896) 148 N. Y. 661, 671, such building restrictions are clearly distinguishable from true legal easements, on the one hand, 5 Am. & Eng. Encyl. of Law 4, 5; *De Gray* v. *Monmouth Beach etc. Co.* (1892) 50 N. J. Eq. 329, 339; and from covenants running with the land, on the other. *Whitney* v. *Union Ry. Co., supra,* 364; 3 Pomeroy, Equity Juris. § 1295. Whether it is possible to sustain the decision on the ground that "equitable easements" are an interest in land within the Statute of Frauds, N. Y. Real Prop. Law §§ 207, 224, seems at least open to question. 3 COLUMBIA LAW REVIEW 63. Several jurisdictions, *Rice* v. *Roberts* (1869) 24 Wis. 461; *Tibbetts* v. *Tibbetts* (1890) 66 N. H. 360; *Duncan* v. *Labouisse* (1854) 9 La. Ann. 49; *Clanton* v. *Scruggs* (1891) 95 Ala. 279, agree with an early New York case taking this view; *Wolfe* v. *Frost* (1846) 4 Sandf. Ch. 72; but New York appears to have rejected the doctrine. *Tallmadge* v. *East River Bank* (1862) 26 N. Y. 105; *Hayward etc. Assn.* v. *Miller, supra; Equitable Life Ass. Co.* v. *Brennan, supra;* but see *Uihlein* v. *Matthews, supra.* In the last instance, the disposition of this question seems to depend on the judicial tendency to a broad or strict construction of the Statute. Cf. *McManus* v. *Cooke* (1887) L. R. 35 Ch. D. 681, 689 seq.

EQUITY—MUTUALITY OF REMEDY—CONDITIONAL DECREE.—The plaintiff and the defendant had entered into a fifteen-year continuous bilateral contract, containing positive and negative promises on both sides, the positive promises not being specifically enforcible; and the positive and negative promises being correlative. After part performance, the defendant broke both its positive and negative promises. The plaintiff demanded an injunction restraining the breach of the latter term. *Held,* the bill was not demurrable, as a conditional decree might be granted. *General Electric Co.* v. *Westinghouse Co.* (1907) 151 Fed. 664. See NOTES, p. 613.

EQUITY—RESTRICTIVE COVENANTS—BY WHOM ENFORCIBLE.—A grantee covenanted with his grantor that the premises conveyed should be used for residential purposes only; and later conveyed the premises by warranty deed "subject to the restrictions contained" in the former deed. The land was then cut up into lots, and conveyed not subject to restrictions. One of the lot owners sought to enforce the original restriction against another. *Held,* Patterson, P. J. and Lambert, J. dissenting, the restriction was not enforcible by the plaintiff. *Korn* v. *Campbell* (1907) 104 N. Y. Supp. 462.

The courts do not hesitate to grant relief as between grantees taking from a common grantor, who restricted the property for the benefit of all in accordance with a building plan. *Sanborn* v. *Rice* (1880) 129 Mass. 387; *Barrow* v. *Richard* (N. Y. 1840) 8 Paige Ch. 351. But the restrictions cannot be enforced as between subsequent holders of subdivisions of a single lot. *King* v. *Dickeson* (1889) L. R. 40 Ch. D. 596; *Barney* v. *Everard* (N. Y. 1900) 32 Misc. 648; *Lewis* v. *Ely* (N. Y. 1905) 100 App. Div. 252; contra, *Winfield* v. *Henning* (N. J. 1870) 6 C. E. Green 88. This proceeds on the theory that a new servitude would be created, as the different portions formerly owed no duty to one another. Such would clearly have been the result in the principal case; as the covenant was made solely for the benefit of the original grantor and his successors, who alone could enforce it. *Eq. Life Ins. Co.* v. *Brennan* (1896) 148 N. Y. 661. The conveyance "subject" to the original restrictions imposed no new liability; cf. *Belmont* v. *Coman* (1860) 22 N. Y. 438; *Dingeldein* v. *R. R. Co.* (1868) 37 N. Y. 575; and was probably inserted to protect the warrantor. See *Boyden* v. *Roberts* (Wis. 1907) 111 N. W. 701, contra.

EVIDENCE—VIEW BY JURY—NECESSITY OF JUDGE'S PRESENCE.—In a trial for robbery the jury, without any objection by the defendant at the time, was allowed to view the premises without the judge. On their return, the

defendant excepted. *Held*, the view was evidence, the judge's presence was necessary, but either the defendant had waived this right, or the error was cured by a subsequent view had in the presence of the judge. *People* v. *White* (Cal. 1907) 90 Pac. 471. See NOTES, p. 607.

INSURANCE—APPLICATION—POLICY—BENEFICIARY.—A life insurance policy was made payable to the insured, his executors, administrators, and assigns. A different beneficiary was named in the application. The insured had the policy in his possession for twelve years and all premiums on it were duly paid. *Held*, the proceeds belonged to the executor of the insured. *Burt* v. *Burt* (Pa. 1907) 67 Atl. 210.

The application for insurance may be regarded as an offer. *Schwartz* v. *Germania Life Ins. Co.* (1872) 18 Minn. 448; *McCully's Admr.* v. *Phœnix etc. Co.* (1881) 18 W. Va. 782. Where the policy as issued does not coincide in terms, with the application, it is a mere counter-offer, *Stephens* v. *Capital Ins. Co.* (1893) 87 Ia. 283; 1 Joyce, Ins. § 58, and requires acceptance in order to become a contract. *Yore* v. *Bankers etc. Assn.* (1891) 88 Cal. 609. In the principal case, acceptance can be implied from the payment of the premiums and possession of the policy by the insured for twelve years. *Bostwick* v. *Mutual Life Ins. Co.* (1902) 116 Wis. 392; *Fire Ins. Co.* v. *Oberholtzer* (1895) 172 Pa. St. 223; *Hunter* v. *Scott* (1891) 108 N. C. 213. The decision may also be sustained on the rule of interpretation that where there is a conflict between the provisions of the policy and statements in the application, the former will govern, *Goodwin* v. *Prov. Savings etc. Society* (1896) 97 Ia. 226, 234; *Hutson* v. *Jenson* (1901) 110 Wis. 26, the policy presumably expressing the last intention as to beneficiaries. See *Hunter* v. *Scott, supra*, reaching the same result.

LANDLORD AND TENANT—HOLDING OVER—TENANCY AT WILL.—On the expiration of a lease containing an arbitration clause, it was agreed that the tenant was to hold as tenant at will pending negotiation. In violation of the original arbitration clause the tenant brought suit. *Held*, the suit would be enjoined. *Morgan* v. *William Harrison, Limited.* [1907] 2 Ch. 137.

If the tenant from year to year, *Conway* v. *Starkweather* (N. Y. 1845) 1 Den. 113, from month to month, *Boreman* v. *Sandgren* (1890) 37 Ill. App. 160, or for any specified period, *Bollenbacker* v. *Fritts* (1884) 98 Ind. 50, holds over with the assent of his landlord, the terms and conditions of the original lease, so far as not inconsistent with the particular tenure permitted by law, apply, in the absence of evidence showing a contrary intention. *Dougal* v. *McCarthy* [1893] L. R. 1 Q. B. 736. This rule was applied where a tenant holding over was declared by the Code to be a pure tenant at will. *German State Bank* v. *Huron* (1900) 111 Ia. 25. This rule rests upon the supposed intentions of the parties; and though in the principal case the tenancy was defined by the act of the parties, and not by the law, the reason which actuates the rule would on that account seem to lose none of its force.

MORTGAGES—AFTER-ACQUIRED PROPERTY—FRAUDULENT IN LAW.—A piano-manufacturing company's mortgage of all its present and after-acquired property reserved to the mortgagor the right of possession with an implied power of sale of the personalty, without liability to account for the proceeds, and with a further provision that possession might be taken on default. Possession was delivered to the defendant pursuant to this provision, and the plaintiff, trustee in bankruptcy of the mortgagor under proceedings begun three days later, sued for the proceeds of the after-acquired personalty. *Held*, the trustee in bankruptcy should recover. *Zartman* v. *First National Bank* (1907) 38 N. Y. Law Jour. No. 15.

A chattel mortgage of after-acquired property, though void at law, is construed in equity as a contract, specifically enforceable, to give a mortgage. *Kritts* v. *Alford* (1890) 120 N. Y. 519. Delivery transforms the inchoate equitable lien into a legal lien, *Wiener* v. *Ocumpaugh* (1877) 71

N. Y. 113, subject only to prior legal liens and the rights of innocent purchasers for value, and not to the rights of subsequent general creditors. *Coats* v. *Donnell* (1883) 94 N. Y. 168. But a chattel mortgage containing provisions such as those in the principal case is in New York held to be fraudulent in law as to all chattels covered by the power of sale, *Russell* v. *Winne* (1868) 37 N. Y. 591; *Southard* v. *Binner* (1878) 72 N. Y. 424, with respect to all creditors of the mortgagor, *Mandeville* v. *Avery* (1891) 124 N. Y. 376, though the mortgage cannot be assailed until by judgment a right to a lien upon the property is obtained. *Skilton* v. *Coddington* (1906) 185 N. Y. 80. Delivery of possession under such a mortgage clearly adds nothing to its validity, or to the mortgagee's rights against creditors; *Quinn & Nolan Co.* v. *Hart* (1888) 1 N. Y. Supp. 388; and since fraudulent, the trustee in bankruptcy may undoubtedly recover the proceeds. *In re Morine Dry Dock Co.* (1905) 14 Am. B. R. 466; *Skillen* v. *Endelman* (1902) 11 Am. B. R. 766.

NUISANCE—INJUNCTION—COMMON LAW LIS PENDENS.—During the pendency of an action brought by an adjacent owner, to compel the removal of the projection into the street of the defendant's building which interfered with the plaintiff's easement of access, the defendant conveyed the premises. *Held*, the grantee was not bound by the judgment. *Ackerman* v. *True* (1907) 105 N. Y. Supp. 12.

Lis pendens applies only where the third party has purchased *pendente lite*, something which is the subject of litigation. *Hawes* v. *Orr* (Ky. 1874) 10 Bush 431. The property must have been within the jurisdiction of the court. *Leavell* v. *Poore* (1891) 91 Ky. 321. The judgment in the principal case was a personal one and the land was in no manner affected, *Ackerman* v. *True* (N. Y. 1899) 44 App. Div. 106, and although the judgment might operate ultimately upon it, this is insufficient. *Feigley* v. *Feigley* (1855) 7 Md. 537. Whether the rule of lis pendens be explained upon the theory of notice, *Murray* v. *Ballou* (N. Y. 1815) 1 Johns. Ch. 566, or upon public policy and a necessity of ending litigation. *Bellamy* v. *Sabine* (1857) 1 De G. & J. 566, the object in creating the doctrine was to prevent the unsuccessful litigant from giving away the property in dispute, to the other's prejudice. *Bellamy* v. *Sabine, supra.* The court cannot in all events prevent the plaintiff from losing the fruits of his judgment, since that may be the result of a change in collateral matters. The court can only make the rule operative by keeping the matter of the litigation within its power. *Houston* v. *Timmerman* (1889) 17 Ore. 499. The principal case is, therefore, correct, since the third person did not acquire anything within the jurisdiction of the court.

PLEADING AND PRACTICE—JOINDER OF CAUSES OF ACTION—NEW YORK CODE § 484.—As a first cause of action the complaint alleged a breach of a contract to use electricity in a certain amount monthly, showing as damage expense in the installation of equipment; and as a second cause of action, deceit, the damage being also expense in the installation of equipment on the faith of the fraudulent representations which induced a contract for electric service. *Held*, that the two causes of action were inconsistent and therefore mis-joined. *Edison Elec. Co.* v. *F. H. Kalbfleisch Co.* (N. Y. 1907) 117 App. Div. 842.

A rescission for fraud is inconsistent with an enforcement of the contract; *Lomb* v. *Richard* (N. Y. 1904) 45 Misc. 129; but an action for deceit implies an affirmance of it, *Wilson* v. *New U. S. Ranch Co.* (1896) 73 Fed. 994, and no election is required. *Bowen* v. *Mandeville* (N. Y. 1883) 29 Hun, 42; s. c. (1884) 95 N. Y. 237. The result of the principal case may, however, be reached on the ground that the contract and tort do not "arise out of the same transaction, or transactions connected with the same subject of action." Code Civ. Pro. § 484, subd. 9. *Seymour* v. *Lorillard* (N. Y. 1885) 8 Civ. Pro. 90; contra, *Robinson* v. *Flint* (N. Y. 1858) 16 How. Pr. 240. The New York courts have refrained from defining the words of this

section. *Wiles* v. *Suydam* (1876) 64 N. Y. 73. In equitable actions some latitude is allowed; *Lamming* v. *Galusha* (1892) 135 N. Y. 239, 244; but in common-law actions the tendency, despite some conflict of authority, is to keep causes of action of different nature separated unless this would hinder a just result. *Anderson* v. *Hill* (N. Y. 1869) 53 Barb. 238. Furthermore, the complaint should affirmatively indicate that the causes of action arose out of the same transaction. *Keep* v. *Kaufman* (N. Y. 1873) 4 J. & S. 141, 150. In other states greater freedom of joinder is allowed. See *Emerson* v. *Nash* (1905) 124 Wis. 369.

PUBLIC SERVICE CORPORATIONS—CARRIERS—LIABILITY FOR SERVANT'S TORTS—INTOXICATED PASSENGER.—The plaintiff, when intoxicated, was received as a passenger upon the defendant's vessel. Subsequently, the captain, discovering him lying upon the floor in a position where he was exposed to injury, lifted him to his feet but made no effort to support him, although knowing his inability to stand alone. The plaintiff fell and was injured. *Held*, the defendant was liable. *Doherty* v. *California Navigation & Imp. Co.* (Cal. 1907) 91 Pac. 419.

The court's theory is that the injury was caused by the manner of removing the plaintiff from his position of danger, and it concludes that a greater duty, by reason of the plaintiff's intoxication, was cast upon the defendant in the situation presented. If putting the plaintiff into a new danger—i. e. a standing position—is merely the method of removing him from the former, this theory is correct, for the degree of care exercised in discharging a duty, must be measured by the mental and physical condition of the passenger. *Croom* v. *C. M. & St. P. Ry. Co.* (1893) 52 Minn. 296. But the act of putting the plaintiff upon his feet might be considered an independent act, since he was well removed from the first dangerous position before he was put into the second. On this view of the facts also, the carrier would be liable, for if the carrier's servants put a passenger into a position of danger, it is liable if injury results. *Sheridan* v. *B. & N. Ry. Co.* (1867) 36 N. Y. 39.

PUBLIC-SERVICE CORPORATIONS—CARRIERS—PASSENGER—CIRCUS-TRAIN.—The plaintiff was injured in a collision between two sections of a train made up entirely of cars owned by his employer, a circus company. The defendant railroad company furnished motive power, operatives, and the use of its tracks, under a special contract surrendering full control, subject only to train-dispatchers' regulations. The plaintiff was on board solely by virtue of this arrangement. *Held*, the relation of passenger and carrier did not exist. *Clough* v. *Grand Trunk Western Ry. Co.* (C. C. A. 1907) 155 Fed. 81.

Privity of contract is not indispensable to such a relation. *Marshall* v. *Railway Co.* (1851) 11 C. B. 655. Thus, on the ground that having undertaken to carry, the railroad company owes its full measure of due care, *Phil. & Reading R. R. Co.* v. *Derby* (U. S. 1852) 14 How. 468, a government mail clerk in suing has the status of a passenger, *Gulf C. & S. F. Ry. Co.* v. *Wilson* (1891) 79 Tex. 371; *Cleveland C. C. etc. R. Co.* v. *Ketcham* (1892) 133 Ind. 346; *Arrowsmith* v. *R. Co.* (1893) 57 Fed. 165, 167; and similarly, an express messenger, *Fordyce* v. *Jackson* (1892) 56 Ark. 594; *Brewer* v. *R. R. Co.* (1891) 124 N. Y. 59—(though not within the rule in *Railroad Co.* v. *Lockwood* (1873) 17 Wall. 357, that the common carrier may not limit its liability for negligence to a passenger, *Long* v. *R. Co.* (1904) 130 Fed. 870)—see 4 COLUMBIA LAW REVIEW 592; and even a Pullman porter. *Jones* v. *Ry. Co.* (1894) 125 Mo. 666; contra, *Hughson* v. *R. R. Co.* (1894) 2 App. Cas. D. C. 98. That the contract with the circus management was one of private carriage only, *Coup.* v. *Wabash Ry. Co.* (1885) 56 Mich. 111; *Chicago, M. & St. P. Ry. Co.* v. *Wallace* (1895) 66 Fed. 506; *Wilson* v. *R. Co.* (1904) 129 Fed. 774, aff'd (1904) 133 Fed. 1022, is not conclusive, for the accommodation of express companies is no more within the duties of a common carrier. *Express Cases* (1886) 117 U. S. 1: contra,

McDuffee v. *Railroad* (1873) 52 N. H. 430; see Hutch., Carriers, 3 Ed. §§ 514-517. The *ratio decidendi* would seem to be the absence of control. *Robertson* v. *R. R. Co.* (1892) 156 Mass. 525. A mail or express car, if not indeed furnished by the carrier, is open to inspection, and it is a part of a regular passenger train run under the complete direction of the railroad company's servants. In view of the peculiar features of a circus transportation contract the plaintiff was here properly declared outside of the rule by which proof of the injurious accident establishes a *prima facie* case for a passenger. *Stokes* v. *Saltonstall* (1839) 13 Pet. 181. Cf. *Southern Pac. Co.* v. *Cavin* (1906) 144 Fed. 348.

QUASI-CONTRACTS—RECOVERY OF TAXES ERRONEOUSLY PAID.—A taxpayer fraudulently neglected to declare her property. Thereafter she was assessed but not within the time limit set by the statute in such cases. To prevent seizure and sale of her property under such illegal assessment, she paid the tax. *Held*, the amount paid could be recovered back. *Commissioners* v. *Lane* (Kan. 1907) 90 Pac. 1092. See NOTES, p. 601.

REAL PROPERTY—COVENANTS RUNNING WITH THE LAND.—A lessee covenanted to sell to the lessor at the end of the term any hay he might not use. The reversion was assigned to the plaintiff. *Held*, the defendant could be restrained from selling the hay to third parties. *Chapman* v. *Smith* [1907] 2 Ch. 97.

The result reached seems sound, as the remaining hay was probably for use on the land, see *Verplanck* v. *Wright* (N. Y. 1840) 23 Wend. 506, but if for the personal use of the lessor, it would be collateral and would not run. *Garton* v. *Gregory* (1862) 3 B. & S. 89; see *Bream* v. *Shrewsberry* (Tenn. 1840) 2 Humph. 126. The reasoning of the principal case that the covenant touched and concerned the land because it affected the premises "in a manner which the lessor chooses to assume will be beneficial to him" is loose and misleading. If a covenant otherwise does not touch and concern the land, it cannot be made do so by agreement of the parties, *Gibson* v. *Holden* (1885) 115 Ill. 199; *Wilmurt* v. *McGrane* (N. Y. 1887) 16 App. Div. 412; *Masury* v. *Southworth* (1859) 9 Oh. St. 340, 348, and if it cannot be accomplished by agreement, it cannot be done by "choosing to assume" it to be beneficial. The case cited for this statement, *White* v. *Hotel Co.* [1897] 1 Ch. 767, 774, uses this test to determine whether a covenant which can run was intended to run, and not to determine when it touches the land.

RECEIVERS—CERTIFICATES—ISSUED FOR REHABILITATION.—The receiver of a street railway company applied for authority to execute a mortgage, of about the same amount as the existing mortgage on the company's property, to constitute a first lien on the property, for the purpose of uniting with other railways and rehabilitating the system. *Held*, that such authority could not be granted. *Merchants' Loan and Trust Co.* v. *Chicago Ry. Co.* (C. C. A. 1907) 35 Nat. Corp. Rep. 267.

Because of the public character attaching to railway property, *Meyer* v. *Johnston* (1875) 53 Ala. 237, 348, when such property has been placed in the hands of a receiver, the courts have imposed upon it liens prior to that of existing mortgages, for many purposes; as, for the preservation and management of the property; *Meyer* v. *Johnston, supra; Wallace* v. *Loomis* (1877) 97 U. S. 146, 162; *Union Trust Co.* v. *Ill. Mid. Co.* (1886) 117 U. S. 434; to pay operating expenses; *Turner* v. *R. R. Co.* (1880) 95 Ill. 134; *Union Trust Co.* v. *Ill. Mid. Co., supra;* to purchase rolling stock; *Swann* v. *Wright* (1884) 110 U. S. 590; *Vilas* v. *Page* (1887) 106 N. Y. 439; for the completion of the road, where upon such completion depended a land grant, the principal security of the mortgagees; *Kennedy* v. *R. R. Co.* (C. C. 1878) 5 Dill. 519; to pay prior existing debts contracted for necessary operating expenses. *Burnham* v. *Bowen* (1884) 111 U. S. 776; *Miltenberger* v. *Ry. Co.* (1882) 106 U. S. 286, 309. But the power to postpone existing liens should

be sparingly exercised. *Credit Co.* v. *R. Co.* (1882) 15 Fed. 46, 49; *V. and C. R. R. Co.* v. *V. C. R. R. Co.* (1877) 50 Vt. 500, 569. The fact that it would be beneficial to the mortgagees will not warrant its exercise, *V. and C. R. R. Co.* v. *V. C. R. R. Co., supra,* but only the necessity to preserve the property as a going concern. *Meyer v. Johnston, supra; Credit Co.* v. *R. Co., supra.* The creation of a prior lien has been authorized only for purposes which come within the contemplated operation of the company; where it extended to rehabilitation of the system it has been refused. *Investment Co.* v. *R. Co.* (1888) 36 Fed. 48.

TORTS—CONSPIRACY—MALICE.—The plaintiff, as agent, procured C. to contract for the purchase within thirty days of his principal's land, and C. paid $500 as a forfeit. The plaintiff sued M., a third party, and C., alleging a conspiracy to induce the owner not to carry out the contract with the plaintiff, by waiting until the thirty days expired, whereby the contract of sale being broken, the plaintiff lost his commission. *Held,* no cause of action. *Roberts* v. *Clark* (Tex. 1907) 103 S. W. 417.

A conspiracy is the combination to do something unlawful either as a means or as an ultimate end, *Commonwealth* v. *Waterman* (1877) 122 Mass. 57, and "unlawful" includes acts which, at least, violate legal rights of another. *Smith* v. *People* (1860) 25 Ill. 9. Here no right of the plaintiff is violated by the alleged act, as his brokerage contract is still intact. Whether the defendants are liable as joint or several tort-feasors depends upon other considerations. The violation of a contractual duty will not support an action of tort by one not a party to the contract. *Conklin* v. *Staats* (1904) 70 N. J. L. 771; *Galbraith* v. *Ill. Steel Co.* (1904) 133 Fed. 485. That the motive for the breach was to injure a third person is immaterial. *South Royalton Bank* v. *Suffolk Bank* (1854) 27 Vt. 505. But the doctrine is recognized, following *Walker* v. *Cronin* (1871) 107 Mass. 555, that intentionally causing loss to another without justifiable cause, and with malicious purpose, is actionable. Cf. *Morgan* v. *Andrews* (1895) 107 Mich. 33. But the breach of a contract is the exercise of a distinct right, lawful, at least, as regards persons not parties; the duties under it look only to the opposite party, just as the correlative right emanates from him, so that no superior right of the third person is violated. See *Walker* v. *Cronin, supra,* 563. M.'s act, not being within the exercise of a specifically acquired right, falls within the principle of the Massachusetts case and in jurisdictions which apply that rule, he should be held liable on the ground of the malice alone. *Chipley* v. *Atkinson* (1887) 23 Fla. 206.

TORTS—SLANDER OF PROPERTY—DAMAGE.—In 1900 the plaintiff's tenant left the premises owing to the house being "haunted," and a newspaper published an account of what had been observed there. In 1904 another paper published a highly colored account of the same, for which the plaintiff recovered damages. In 1906 the defendant published a similar account and the plaintiff sued for damages. *Held,* the defendant was not liable in the absence of fresh harm. *Barrett* v. *Ass. Newspaper Co.* (Eng. 1907) King's Bench, July 3rd.

Actionable statements disparaging property are called slander of title; there is a distinct class, however, in which no title is disparaged, but rather the quality of the property. See *Gott* v. *Pulsifer* (1877) 122 Mass. 235. Such an action is not one for slander, but an action on the case for damage, wilfully and intentionally done without just occasion or excuse. *Malachy* v. *Soper* (1836) 3 Scott 723. The plaintiff must prove that the publication was malicious and also a specific money damage. *Royal Baking Powder Company* v. *Wright, Crossley & Co.* (1900) 18 Rep. Pat. Cas. 101. Publication without "justification" or "just cause" is the usual evidence of malice, although the degree of malice necessary is difficult to define. Cf. *Glamorgan Coal Co.* v. *Miners Federation* [1903] 2 K. B. 545, 573. The particularity with which the special damage need be proved is regulated by the nature of the acts and the circumstances under which they were done. *Ratcliffe* v.

Evans [1892] 2 Q. B. 524; *Collins* v. *Whitehead* (1888) 34 Fed. 121. But see *Butts* v. *Long* (1902) 94 Mo. App. 687, where nominal damages were sufficient to support the action (Bland, P. J. dissenting).

TRADE-MARKS AND NAMES—TRADE NAMES—USE OF INDIVIDUALS' NAME BY CORPORATION.—John Cash & Sons had an extensive connection and high reputation in business as spinners of yarn, and the name "Cash" had become associated with the class of goods manufactured by that firm and by their successors, the plaintiffs. John Harwood Cash, a former employee of John Cash & Sons, in conjunction with others, formed and registered the defendant joint stock company for the purpose of carrying on a similar business under the name of Harwood Cash & Co., Limited. *Held*, that an injunction would issue to restrain defendant from using this name or any name calculated to mislead the public into thinking that the defendants' goods were those of the plaintiff. *Fine Cotton Spinners etc. and John Cash & Sons, Limited* v. *Harwood Cash & Co., Limited* [1907] 2 Ch. D. 184.

While it is well established that in the absence of actual fraud or false representation a man may carry on business under his own name in competition with a similar business previously well established under the same name, *Meneely* v. *Meneely* (1872) 62 N. Y. 427, or may do so in partnership with others, *Turton* v. *Turton* (1890) 42 Ch. D. 128, even though the public are in fact misled, the decision in the principal case seems entirely sound. *Tussand* v. *Tussand* (1890) 44 Ch. D. 678. Where the element of privilege connected with the use of one's own name is absent, the controlling rule is that although there is no actual intent to deceive, the use of a name calculated to deceive will be enjoined. 7 COLUMBIA LAW REVIEW 120; *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* [1899] A. C. 83; *Hendriks* v. *Montagu* (1881) 17 Ch. D. 638. A corporate name, in contemplation of law, is distinctive and applicable only to the entity apart from the shareholders. *Smith* v. *Plank Road Co.* (1857) 30 Ala. 650, 664. So also the name of a joint stock company is unconnected, in contemplation of law, with the names of its shareholders, *Hewitt* v. *Storey* (1889) 39 Fed. 419, the defendant company could have no privilege of using an individual shareholder's name.